Nos. 12317-12318-12319

In the United States Court of Appeals for the Ninth Circuit

HUGH H. EARLE, Collector of Internal Revenue for the District of Oregon,

v. Appellant,

LLOYD BABLER, RICHARD BABLER, JAMES A. POLLOCK and J. H. SCHESTAK, doing business as Lloyd Babler,

Appellees.

HUGH H. EARLE, Collector of Internal Revenue for the District of Oregon,

v. Appellant,

J. N. CONLEY, M. J. CONLEY and LLOYD BABLER, doing business as Babler and Conley,

Appellees.

HUGH H. EARLE, Collector of Internal Revenue for the District of Oregon,

v. Appellant,

J. N. CONLEY, M. J. CONLEY, HARRY BABLER and LLOYD BABLER, doing business as Babler Brothers,

Appellees.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

BRIEF FOR THE APPELLANT

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Appellees.

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Appellees.

No. 12319

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ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

BRIEF FOR THE APPELLANT

OPINIONS BELOW

The District Court entered no opinions below. The findings of fact and conclusions of law of the District Court

(R. 14-18, 45-50, 74-78) are not officially reported.

JURISDICTION

These appeals involve federal transportation taxes. The taxes in dispute were paid on October 20, 1947. (R. 16, 47, 76.) Claims for refund were filed on November 7, 1947, and were rejected by notices dated May 27, 1948 (R. 16, 48, 76). Within the time provided in Section 3772 of the Internal Revenue Code, and on June 21, 1948, the taxpayers brought actions in the United States District Court of Oregon for recovery of taxes paid. (R. 4-6, 34-36, 64-66.) Jurisdiction was conferred on the District Court by 28 U.S.C., Section 1340. The judgments were entered on May 26, 1949. (R. 19, 51, 79.) Notices of appeal were filed on June 25, 1949 (R. 27, 59, 80), pursuant to the provisions of 28 U.S.C., Section 1291.

QUESTIONS PRESENTED

1. Whether the truck owners performed substantially all the functions of transporting property within the meaning of Section 3475 of the Internal Revenue Code.

2. Whether the driver-owners of certain dump trucks were employees of the taxpayers or whether they were persons engaged in the business of transporting property for

hire within the purview of Section 3475 of the Internal Revenue Code.

3. Whether the drivers of certain dump trucks, to the extent that they did not drive their own trucks, were employees of the taxpayers or employees of the owners of the trucks, and the owners were persons engaged in the business of transporting property for hire within the meaning of Section 3475 of the Internal Revenue Code.

STATUTE AND REGULATIONS INVOLVED

These are set forth in Appendix A, *infra.*

STATEMENT

These three suits for refund were consolidated because basically the same question is presented in each case. Three taxpayers are involved here, instead of one, because the membership of the taxpayer-partnership changed from time to time. The taxable period is a continuing one, December 1, 1942—December 31, 1945. (R. 93.)

The facts as found by the District Court[1] (R. 14-17,

1. The Collector contends that these findings are clearly erroneous as to (a) the existence of a lease agreement; (b) the extent of the control exercised by the taxpayers over the truck drivers, in that this control was also exercised by the truck owners.

45-48, 74-16), and the admitted facts of the pre-trial orders (R. 8-10, 38-41, 68-70), may be summarized as follows:

The taxpayers were partners in the general contracting business. As general contractors, they entered into several contracts undertaking certain road construction or resurfacing work. In order to carry out these contracts, the taxpayer-appellees entered into verbal agreements with various truck owners for the purpose of transporting bulk construction material from the stockpiles, quarries, or other locations, to the sites of the roads which they were constructing or resurfacing. In some cases a truck was operated by the owner and in some instances by others. The owners of these trucks were paid on an hourly, load or yard mile basis. (R. 9, 15-16, 39, 46-47, 69, 75.)

The truck drivers, whether they were truck owners or not, were subject to the will and control of the taxpayers, not only as to what should be done but how it should be done, and the taxpayers had the right to discharge the truck drivers, whether truck owners or not. (R. 17, 48, 76.)

On October 20, 1947, the sum of $893.87, $173.11, and $4,537.15 were levied and collected as transportation taxes, penalties and interest. Taxpayers thereafter filed claims for refund, and these claims were subsequently rejected by the Commissioner of Internal Revenue on May 27, 1948. (R. 16, 47-48, 76.)

The taxpayers brought these suits for refund and were

given judgments in the District Court. (R. 18-19, 50-51, 78-79.) These suits are consolidated here as a single case upon a consolidated transcript of records. (R. 172.)

STATEMENT OF POINT TO BE URGED

The court erred in holding that the truck owners were not persons engaged in the business of transporting property for hire within the purview of Section 3475 of the Internal Revenue Code.

SUMMARY OF ARGUMENT

The transportation tax should have been imposed on the amounts paid by the taxpayers to the truck owners for the transportation of property. Disregarding the particular form of the agreement under which the transportation was effectuated, the truck owners furnished substantially all the facilities for and performed substantially all the functions of transporting property. This is shown both by the facts of the instant cases, and by analogy to the motor carrier cases, in which the situations involving contract carriers have been thoroughly examined.

Further, it is the Collector's contention that the question of the existence of lease agreements in the cases at bar is a question of law reviewable by this Court. However, even assuming it is a question of fact, then the finding as to the

existence of such lease agreements is clearly erroneous. An independent contractor relationship was established rather than that of employer-employee—these were not agreements for the exclusive use of trucks but were contracts for the services of independent truckers.

THE DISTRICT COURT ERRED IN HOLDING THAT THE TRUCK OWNERS WERE NOT PERSONS ENGAGED IN THE BUSINESS OF TRANSPORTING PROPERTY FOR HIRE WITHIN THE PURVIEW OF SECTION 3475 OF THE INTERNAL REVENUE CODE.

A. Regardless of the form of the arrangements established by the contract, the truck owners furnished substantially all the facilities for and performed substantially all the functions of transporting property.

Bridge Auto Renting Corp. v. *Pedrick,* 174 F. 2d 733 (C.A. 2d), certiorari denied October 17, 1949, is directive of the disposition to be made of the instant cases. There, the taxpayers were corporations in which the taxpayer-lessor of trucks furnished drivers and handled driver payrolls, subject to reimbursement for all compensation and taxes paid. The drivers were under the exclusive direction and control of the lessees and could only be discharged by them. The majority of the court held (p. 737) that the taxpayer's operations were analagous to those of companies which had been held to be contract carriers "under the Motor Carrier Act," and that the taxpayer substantially performed all the functions of transporting the property. The

court stated (p. 737) that the decision should turn upon the correct answer to the query, "Did the appellant in fact furnish substantially all the facilities for and perform substantially all the functions of, transporting the property * * *."

This case was followed in another recent decision, *John J. Casale, Inc.* v. *United States* (C. Cls.), decided October 3, 1949 (1949 C.C.H., par. 9409). In this case, the court held that drivers furnished with the taxpayer's trucks were taxpayer's own employees. Thus, the court held that the transaction was within the purview of the taxing statute, stating (p. 13,122):

> The taxing statute is not concerned with the form of the arrangements if the substance of the agreements or arrangements between the parties, when considered as a whole, add up to the transportation by one person of the property of another for hire * * *.

Thus, here it seems evident that in substance, the facts add up to such transportation by the truck owners as to come within Section 3475 of the Internal Revenue Code. (Appendix A, *infra.*) The owner-drivers and other drivers were placed on a payroll maintained by the taxpayers. The payments to the drivers were deducted from the amounts paid to the truck owners under the oral agreements, in addition to the deduction for social security, unemployment insurance, state industrial insurance premiums and other charges. (R. 97-107.) Thus, wages were constructively

paid by the truck owners. (R. 14.) Further, the truck owners paid all operating and maintenance expenses of their trucks, purchased their own Public Utility Commission permits as carriers for hire, and carried and paid for their own public liability and property damage insurance. (R. 155, 158.) The truck owners, in addition to the contractors, had a right to discharge drivers. (R. 156.) Also, some of the truck owners, simultaneously with their operations with the taxpayers, performed similar functions with other equipment for other contractors. (R. 154.)

In addition, by analogy to the cases arising under the Motor Carrier Act, 1935, which by the Act of August 9, 1935, c. 498, 49 Stat. 543, Sec. I, was made Part II, Interstate Commerce Act, c. 104, 24 Stat. 379, it seems clear that substantially all the functions of transporting property were performed in order to bring the truck owners within the category of contract carriers, and hence make the transportation subject to tax.

Section 3475 of the Internal Revenue Code imposes a tax on "* * * amounts paid to a person engaged in the business of transporting property for hire * * *." Section 143.1 of Treasury Regulations 113 (Appendix A, *infra*), further defines the term "person engaged in the business of transporting property for hire" to include a "contract carrier."

These Regulations no doubt interpreted the taxing

statute in the light of the Motor Carrier Act, 1935, *supra.* In Section 203 (a) (15) of this Act (49 U.S.C. 1946 ed., Sec. 303), the term "contract carrier by motor vehicle" was defined to mean any person, not a common carrier, "who or which, under special and individual contracts or agreements, and whether directly or by lease or any other arrangement, transports passengers or property in interstate or foreign commerce by motor vehicle for compensation"—language which is similar to that in Section 3475 of the Internal Revenue Code, except for the limitation as to interstate or foreign commerce.

Further, there is no reason to suppose that Congress did not at least intend to apply the transportation tax of the Internal Revenue Code to the same thing that it meant to regulate in the Motor Carrier Act. As stated in *Bridge Auto Renting Corp.* v. *Pedrick, supra,* pp. 737-738, "the problem is much the same."

Therefore, in applying the law in this area to see if the truck owners involved in the instant cases would be subject to regulation as contract carriers under the Motor Carrier Act, we find a persuasive answer.

In *Motor Haulage Co.* v. *United States,* 46 M.C.C. 107, 70 F. Supp. 17 (E.D. N.Y.), affirmed, 331 U.S. 784, the company sought to set aside an order of the Interstate Commerce Commission imposing conditions upon the granting of a permit to it as a contract carrier based upon grandfather

rights on the ground that it was not a contract carrier with respect to certain of its so-called contracts of rental without responsibility and that it was, therefore, improper to limit its operations thereunder. The court in holding that the company was engaging in transportation for compensation, and that it was therefore a contract carrier, summarized the situation as follows (p. 21):

> We are speaking of a case where the plaintiff furnishes not only the vehicle but the driver, is compensated, on a mileage or time basis, pays the hire and other incidental expense of the driver, agrees to maintain the leased equipment in good order and repair, to carry insurance, and to garage and fuel the trucks, but does not specifically undertake to transport cargo or to be responsible for loss or damage.

One contract of rental in the *Motor Haulage* case, *supra,* is particularly significant. It specifically provided that the drivers furnished by the lessor should be employees of the lessee, and that the lessor did not assume any responsibility

for the direction, or any of the acts, of such employees.[2] This situation goes further than that in the instant cases, and yet the lessor was held to be a contract carrier. The Commission held that this clause did not overcome the presumption of for-hire transportation, stating (46 M.C.C. 107, 118):

> This presumption is not overcome by the mere fact that the contracts provide that the drivers are the employees of the shipper and that Motor Haulage does not assume any responsibility for the direction, or any of the acts, of such drivers. The drivers' wages, compensation insurance, and social security are all paid by Motor Haulage. Although it is reimbursed therefor by the shipper, this amounts to nothing more than additional compensation for Motor Haulage's service, sup-

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2. The full text of this provision which is quoted in the opinion of the Commission (46 M.C.C. 107, 116) is as follows:

> For the sole convenience of the lessee (shipper) the lessor (Motor Haulage), if requested by the lessee so to do, shall pay the wages, compensation insurance, Social Security taxes, and bonding fees of the employees engaged by the lessee to act as chauffeurs and helpers on the said vehicles and shall charge the lessee the cost thereof plus 1% for handling charges, but in the performance of this service the lessor does not assume any responsibility for the direction or any of the acts, of such employees of the lessee, and the act of performing this service by the lessor for the lessee's convenience shall not in any way relieve the lessee from any of its responsibilities set forth under the several clauses of this agreement.

plementing the amounts specified in the written contracts.

It has been repeatedly held by the Interstate Commerce Commission that a lessor of trucks who furnishes drivers is a contract carrier. *Edward Allen Carroll,* 1 M.C.C. 788; *Bonner Hauling Co.,* 41 M.C.C. 404; *Consolidated Trucking, Inc.,* 41 M.C.C. 737; *McKeown Transportation Co.,* 42 M.C.C. 792; *Transportation Activities of Wartena,* 44 M.C.C. 131.

In the *Motor Haulage* case, *supra,* and in the instant cases, the truck owners were compensated on a mileage or time basis (R. 16), paid for the upkeep and maintenance, and carried insurance on the equipment (R. 158). Here, the owners, like carriers, directed the drivers to follow the instructions of the customers (taxpayers) with respect to the time of reporting, the material to be transported, and the place of origin and destination—these are the instructions given by a customer to a carrier. Hence, it seems that the truck-owners were contract carriers; hence, this is precisely the type of situation the taxing statute is designed to include.

It follows then that on the particular facts of the instant cases or by analogy to the motor carrier cases, regardless of the form of the agreement, the truck-owners furnished substantially all the facilities for and performed substantially all the functions of transporting property.

B. The agreements here were not leases but amountd to arrangments in which the transportation was furnished by the truck owners.

Even though the nature of the agreements here is relevant, the Collector contends that they were not leases. The question as to whether there were verbal lease agreements in the instant cases, in that it is relative to the interpretation of contracts, presents a question of law to this Court. *Hamilton* v. *Liverpool &c. Ins. Co.,* 136 U.S. 242; 3 Williston, Contracts, Sec. 616 (1936 ed.).

However, assuming *arguendo* that a question of fact is presented, the Collector contends that on the entire evidence the findings are clearly erroneous, within the meaning of Rule 52 (a) of the Federal Rules of Civil Procedure. As stated in *United States* v. *Gypsum Co.,* 333 U.S. 364, 395:

> A finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.

The Public Utility Commission permits were held by the truck owners, and not by the taxpayers. However, if a lease of the trucks was made, then it was necessary that the permits be held by the lessee. (R. 122-126.) Further, the so-called leases of the trucks involved in the cases at bar are not real leases at all. A real lease presupposes a surrender to the lessee of such exclusive possession and control as to give the lessee the exclusive use of the trucks for a given period of time. Contrariwise, the parties here contracted

for services only. The determinative factor as to the existence of a lease in these cases is whether or not the employment status was that of employer-employee or independent contractor. If the latter, then clearly, no lease was made, and the taxing statute is inapplicable. M.T. 9, 1943 Cum. Bull. 1159.

Few problems in the law have given a greater variety of application and conflict in results than in cases in the borderland between what is clearly an employer-employee relationship and what is one of independent, entrepreneurial dealing. See Part I, Douglas, Vicarious Liability and Administration of Risk, 38 Yale L. J. 584 (1929). The courts have long wrestled with this problem, and the traditional common law test—the physical control test employed in tort cases, including the related workmen's compensation cases—has not provided a definitive answer. It requires that the courts consider and weigh a number of familiar factors; it is not an automatic standard nor one in which each factor receives a mathematical predeterminable amount of weight. Further, the courts have varied greatly in the application of these factors and the results they reach.[3]

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3. In the interpretation of certain statutory concepts where the employer-employee relationship is of pivotal importance, it has been recognized that it is difficult to fit economic relationships neatly into the categories "employer" and "employee," which an earlier law had shaped for a different purpose. See *Labor Board* v. *Hearst Publications,* 322 U.S. 111; *United States* v. *Silk,* 331 U.S. 704.

Most informative as to the correct result to be reached in the instant cases are the criteria of the employment relation set forth in the Restatement of the Law, Agency, Sec. 220. (See Appendix B, *infra.*) A consideration of these factors relative to the informative case in this area, *Bridge Auto Renting Corp.* v. *Pedrick, supra,* and the cases at bar, impels the conclusion here that the truck owners were independent contractors. In both groups of cases there was a distinct occupation, the workmen supplied their own instrumentalities[4] (R. 148, 153), the payment was on a time, load or yard-mile basis, the operating expenses were paid by the truck owners (R. 158), and the parties considered themselves to be creating an independent contractor relationship (R. 147-149).

Of importance is the control factor, the nonexistence of which may be established by evidence of many kinds. As Professor Seavey concludes in Speculations As To "Respondeat Superior," Harvard Legal Essays, pp. 433, 458 (1934)—

> It is quite true that in most of the master and servant situations there is no physical control by the master, but the relationship ordinarily carries with it a power

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4. See Restatement of the Law, Agency, Section 220: Illustration 6. "P employs A to drive him around in A's automobile. The inference is that A is not P's servant."

> of control over the servant through economic subjection * * *.

However, that kind of control does not exist here where the truck owner may have other trucks working with other contractors. *Harrison* v. *Greyvan Lines,* decided with *United States* v. *Silk,* 331 U.S. 704.

The principal question is similar to that posed in a case considered by this Court, *Anglim* v. *Empire Star Mines Co.,* 129 F. 2d 914. There, the lessor-owners rented certain coal mines to individual miners. In holding the miners to be individual contractors, despite the fact that the owner furnished most of the mining tools, and had the right to require the discharge of objectionable workmen, this court stated (p. 917):

> The lessors appear both in theory and in practice to have been really independent contractors. In respect of the right of the lessor to request the discharge of objectionable workmen, the court found that, as mutually understood, its retention was for purpose only of suppressing highgrading and of insuring compliance with safety regulations so essential in underground work.—The lessor's supplying tools, is, of course, an evidentiary factor of weight.—*The quality of the relationship is to be judged by the presence or absence of no single evidentiary factor, but by an overall view.* (Italics supplied.)

United States v. *Silk* and *Harrison* v. *Greyvan Lines,* both *supra,* are also of relevance. These cases held the owner-drivers employed by Silk, a coal company, and by

Greyvan, a trucking company—in spite of the approach of the court i.e., broader and more factual than the common law test—to be independent contractees. The Court stated (p. 719):

> But we agree with the decisions below in *Silk* and *Greyvan* that where the arrangements leave the driver-owners so much responsibility for investment and management as here, they must be held to be independent contractors. These driver-owners are small business men. They own their own trucks. They hire their own helpers. In one instance they haul for a single business, in the other for any customer. The distinction, though important, is not controlling. It is the total situation, including the risk undertaken, the control exercised, the opportunity for profit from sound management, that makes these driver-owners as independent contractors.

See, also, *United States* v. *Mutual Trucking Co.,* 141 F. 2d 655 (C.A. 6th); *Glenn* v. *Standard Oil Co.,* 148 F. 2d 51 (C.A. 6th).

All of these cases seem to be directly in point. One of them is a decision of this Court. They are sound applications of the law, and it is evident, on their reasoning, that the transportation here was not accomplished by the taxpayers themselves (lease) but through the medium of independent contractors (no lease). The problem in these cases many times is to find out if there has been an agreement to lop off the particular function in question from one person's enterprise and to allocate it to another. This is

precisely the situation here, and what we find is essentially an inter-business rather than an intra-business activity; it was clearly a transportation of property for compensation.

In *Boston Elevated Railway Co.* v. *Malley,* 288 Fed. 864 (Mass.), while it was recognized that the degree of control over a vessel given the respective parties under a charter determined whether it was essentially a lease of the vessel or a contract for transportation services, it was held that amounts were paid for transportation, where the agreement required the owner to provide the personnel, supplies and bunker coal, and to maintain the vessel. The role of the truck owners in the instant case was not substantially different.

The only appellate decision involving this precise situation relative to the transportation tax, *Bridge Auto Renting Corp.* v. *Pedrick, supra,* has already been discussed. The other decided cases, interpretative of Section 3475 of the Internal Revenue Code, if contrary, are clearly wrong.

In *Ohio River Sand Co.* v. *United States,* 60 F. Supp. 563 (W.D. Ky.), a tax was levied upon payments made under an agreement to furnish a tug motor boat to an oil company for the purpose of towing empty or loaded barges. The owner was responsible for navigation and furnished his own crew. The case is distinguishable, in part, in that the compensation there had no relation to the amount of use. *Bridge Auto Renting Corp.* v. *Pedrick, supra,* p. 738, stated

that this case should not be followed. It is in fact inconsistent with the contrary conclusion arrived at in the *Boston Elevated Railway Co.* case, *supra.*

In *Lyle* v. *United States,* 76 F. Supp. 787 (N.D. Ga.), the court held that the movement of earth by dump trucks in connection with grading and leveling operations in the construction of an airfield, all of which movements, being within the confines of the airfield, did not constitute transportation within the meaning of the taxing statute. This case, therefore, has no relevancy here where the movements, instead of 1,500 feet, were up to ten miles (R. 117), and Public Utility Commission permits were required (R. 122-126). In *Williams* v. *United States,* 72 F. Supp. 300 (Ariz.), the owner did nothing but rent trucks, and the lessee of the trucks obtained the drivers, paid their wages and incidental expenses, garaged the trucks on the job site, and maintained exclusive control of their operations, except for maintenance.

CONCLUSION

For the above reasons, it is submitted that the judgment below should be reversed.

Respectfully submitted,

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NOVEMBER, 1949.

APPENDIX A.

Internal Revenue Code:

SEC. 3475. TRANSPORTATION OF PROPERTY.

(a) *Tax.*—There shall be imposed upon the amount paid within the United States after the effective date of this section for the transportation, on or after such effective date, of property by rail, motor vehicle, water, or air from one point in the United States to another, a tax equal to 3 per centum of the amount so paid, except that, in the case of coal, the rate of tax shall be 4 cents per short ton. Such tax shall apply only to amounts paid to a person engaged in the business of transporting property for hire, including amounts paid to a freight forwarder, express company, or similar person, but not including amounts paid by a freight forwarder, express company, or similar person for transportation with respect to which a tax has previously been paid under this section. In the case of property transported from a point without the United States to a point within the United States the tax shall apply to the amount paid within the United States for that part of the transportation which takes place within the United States. The tax on the transportation of coal shall not apply to the transportation of coal with respect to which there has been a previous taxable transportation.

* * * *

(26 U.S.C. 1946 ed., Sec. 3475.)

Treasury Regulations 113 (1943 ed.), promulgated under the Internal Revenue Code:

Sec. 143.1.

Meaning of Terms.—As used in these regulations, unless otherwise specified or indicated by the context—

(a) *General.*—The terms defined in the applicable provisions of law shall have the meanings so assigned to them.

(b) *Person engaged in the business of transporting property for hire.*—The term "person engaged in the business of transporting property for hire" includes a common carrier, contract carrier, local moving or drayage concern, freight forwarder, express company, or other person transporting property for hire wholly or in part by rail, motor vehicle, water, or air.

(c) *Carrier.*—The term "carrier" is coextensive with the term "person engaged in the business of transporting property for hire."

(d) *Transportation.* — The term "transportation" as used herein means the movement of property by a person engaged in the business of transporting property for hire, including interstate, intrastate, and intracity or other local movements, as well as towing, ferrying, switching, etc. In general it includes accessorial services furnished in connection with a transportation movement, such as loading, unloading, blocking and staking, elevation, transfer in transit, ventilation, refrigeration, icing, storage, demurrage, lighterage, trimming of cargo in vessels, wharfage, handling, feeding and watering live stock, and similar services and facilities.

(e) *Property.* — The term "property" means any physical matter regardless of value over which the right of ownership or control may be exercised, including

currency, documents, papers of all kinds, etc.

* * * *

Sec. 143.13.—*Application of Tax.*—

(a) *In general.*—The tax is payable by the person making the taxable transportation payment and is collectible by the person receiving such payment. (See section 143.50.)

The tax applies to the total amount paid within the United States for transportation of property from one point in the United States to another, even though while en route part of the transportation movement is through a foreign country.

The tax applies to any payment, not specifically exempted, for the transportation of property, made to a person engaged in the business of transporting property for hire, including a payment made by one such person to another, but not including an amount paid by a carrier, a freight forwarder, express company, or similar person for transportation with respect to which a tax is payable to such person.

The tax applies only to amounts paid after December 1, 1942, for transportation which originated on or after that date. No tax attaches to payments for transportation originating prior to the first moment of December 1, 1942. Payments made prior to December 2, 1942, are not taxable regardless of when the transportation occurs.

In the case of property transported from a point without the United States to a point within the United States the tax applies to any amount paid within the United States for that part of the transportation which takes place within the United States.

Where the amount paid in the United States covers the entire movement of property from point of origin in a foreign country to an inland point in the United States, the tax will apply to the pro rata part of such payment which represents transportation within the United States. However, in the case of shipments of foreign origin arriving by water, no tax will attach to transportation or services performed prior to the unloading of property at the port of first arrival.

The tax does not apply: (1) to an amount paid outside the United States for the transportation of property from a point without the United States to a point within the United States; (2) to an amount paid by a carrier, freight forwarder, express company, or similar person for the transportation of property with respect to which a tax is payable to such carrier, freight forwarder, express company, or similar person; or (3) to an amount paid for the transportation of property in course of exportation or shipment to a possession of the United States and actually so exported or shipped (see section 143.30). For governmental exemptions see Subpart D.

APPENDIX B.

Restatement of the Law, Agency:

SEC. 220. *Definition.*

* * * *

(2) In determining whether one acting for another is a servant or independent contractor, the following matters of fact, among others, are considered:

(a) the extent of control which, by the agreement, the master may exercise over the details of the work;

(b) whether or not the one employed is engaged in a distinct occupation or business;

(c) the kind of occupation with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;

(d) the skill required in the particular occupation;

(e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;

(f) the length of time for which the person is employed;

(g) the method of payment, whether by the time or by the job;

(h) whether or not the work is a part of the regular business of the employer; and

(i) whether or not the parties believe they are creating the relationship of master and servant.